IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4714 of 1989
with
MISC. CIVIL APPLICATION NO.667 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GUJARAT STATE ROAD TRANSPORT CORPORATION
Versus
SHRI.GOVINDBHAI R.VANKAR, C/O. S.T.KARMACHARI UNION,

Appearance:
1. Special Civil Application No. 4714 of 1989
MR PRANAV DESAI) for Petitioner No. 1
MR GIRISH PATEL for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 03/05/2002

ORAL JUDGEMENT

Heard Mr.Pranav G. Desai, learned advocate appearing on behalf of the applicant - petitioner

Corporation. Present Misc. Civil Application is filed by the original petitioner with prayer to recall the order passed by this Court on 11th April, 2002, whereby the main matter has been ordered to be dismissed in default.

Considering submissions of learned advocate Mr.Desai and the averments made in this application, present misc. civil application is allowed. The order passed by this Court dated 11th April, 2002 in SCA No.4714 / 1989 is hereby recalled with all prayers on record on the date of order and accordingly, the main matter is restored to its original number. This Misc. Civil Application stands disposed of accordingly.

Since this Court has restored the main matter to its original number and file, this Court has heard learned advocate Mr.Pranav G. Desai for petitioner Corporation and Mr. Girish Patel for respondent in connection with main matter.

The petitioner Corporation has challenged two orders passed by the Industrial Tribunal, Vadodara, of which, first order passed by the Industrial Tribunal, Vadodara in Complaint No.115 / 1982 - New No.14 / 1984 dated 22nd December, 1988, wherein the tribunal has granted full wages from 10th June, 1980 to 17th September, 1982. Thereafter, the respondent workman had filed complaint No.7 / 83 - new No. 23/ 1984 under Section 33-A of the Industrial Disputes Act, 1947 dated 23rd December, 1988, wherein the Industrial Tribunal, Vadodara has set aside dismissal order and granted reinstatement with continuity of service with effect from 10th June, 1980 with all backwages and service benefits to the respondent workman. As a result of the second order passed by the tribunal, which covered the relief which has been granted by the first order. However, these two being separate orders passed by the tribunal, therefore, the petitioner Corporation has challenged both these orders in this petition. At the time of issuing RULE, this Court has passed order on 21st January, 1991 as under :-

"Rule. Heard learned advocates appearing for the parties as regards interim relief.

2. The prayer with regard to stay of the order regarding reinstatement in service cannot be granted. The workman shall be reinstated in service. However, the workman shall be paid amount of back wages to the extent of 50 % only.

> As regards the balance of amount of 50 % of the backwages is concerned, it is directed that the petitioner Corporation will be at liberty to withhold the same til the final disposal of the petition on condition that if the petitioner corporation fails in this petition, the amuont retained by it, shall be paid to the respondent workman with 15 % interest. The amount of 50 % of the backwages of the workman shall be paid by the petitioner Corporation latest by March 31, 1991."

As per the order passed by this Court, this Court has not stayed reinstatement of the respondent workman but on the contrary, this Court has directed to the petitioner Corporation to reinstate the respondent workman in service and pay 50 % backwages interim period and to withhold 50 % backwages till final disposal of the petition and in case if the petitioner corporation fails, then the petitioner Corporation shall have to pay 50 % backwages with 15 % interest to the respondent workman. This Court has also directed the petitioner Corporation that 50 % backwages of the interim period shall be paid to the respondent workman latest by 30th March, 1991.

Learned advocate Mr.P.G.Desai appearing on behalf of the petitioner Corporation has submitted that once the tribunal has examined the merits and come to the conclusion that misconduct in question is found to be proved but set aside the dismissal order only on the ground of non payment of subsistence allowance, is clear error committee by the Industrial Tribunal. Mr.Desai has also submitted that misconduct in question which has been committed by the respondent workman recovering the fare of Rs.1.75 at the rate of Rs.0.35 ps from passengers and not issuing the tickets of and Rs.2.05 ps was found excess and accordingly considered this misconduct relating to dishonesty and misappropriation and in such cases, the tribunal should not have passed the order of re instatement with full backwages in favour of the respondent workman. Mr.Desai has also submitted that initially the respondent workman was suspended on 10th June, 1980 and therefore, permission application was filed by the petitioner Corporation and he was put under suspension but no wages of the interim period has been paid by the petitioner Corporation to the respondent workman. Thereafter, the respondent workman was dismissed from service on 7th September, 1982 and that order of removal was withdrawn on 17th September, 1982. Thereafter, again on 14th December, 1982 dismissal order was passed by the petitioner Corporation, for which,

permission application was granted by the conciliation officer. Therefore, the tribunal has committed gross error in considering this technical aspect and set aside the order of dismissal.

Learned advocate Mr.Girish Patel appearing on behalf of the respondent workman has submitted that initially when the respondent workman was put under suspension on 10th June, 1980, at that time, permission application was filed by the petitioner Corporation but no subsistence allowance was paid to the respondent workman. Thereafter, the dismissal order was passed on 7th September, 1982 which was withdrawn on 17th September, 1982 , for that, permission application was filed but no order of conciliation officer granting permission has been produced on record by the Corporation. Thereafter, on 14th December, 1982 dismissal order was passed by the petitioner Corporation. Learned advocate Mr.Girish Patel has submitted that not to pay subsistence allowance during pendency of permission application filed under Section 33 of the Act, amounts to denial of reasonable opportunity to the respondent workman and on that ground, the tribunal has rightly set aside the order of dismissal. However, Mr.Patel has relied on two decisions of the Apex Court reported in AIR 1999 SC 1416 and AIR 2000 [2] SCW pg.1123.

I have considered submissions of learned advocates for the parties. The question is that the respondent workman was protected workman and therefore before terminating the respondent workman, if any dispute is pending before the concerned authority, the petitioner Corporation shall have to ask for permission of such authority and without such permission, dismissal order cannot be come into effect. Therefore, on 10th June, 1980 permission application was filed by the petitioner Corporation and simultaneously the respondent workman was suspended during pendency of permission application. But no subsistence allowance was paid to the workman. Thereafter, the respondent workman was dismissed from service on 7th September, 1982 but said order came to be withdrawn on 17th September, 1982 and again permission application was filed but no order of granting permission was produced on record by the petitioner Corporation. But thereafter on 14th December, 1982 also, the respondent workman was dismissed from service and for that also, no order has been produced on record. Now the question is that during the pendency of permission application, no subsistence allowance has been paid to the respondent workman though the workman was protected

workman. Therefore, this aspect has been taken into account by the tribunal which amounts to denial of reasonable opportunity as held by the Apex Court in aforesaid two decisions relied upon by Mr. Patel . In case of FAKIRBHAI FULABHAI SOLANKI VS. PRESIDING OFFICER AND ANOTHER reported in AIR 1986 SC 1168, wherein it is held that suspension order is passed but not to pay subsistence allowance during pendency of the permission application, it amounts to denial of reasonable opportunity to the respondent workman and ultimately it resulted to vitiating the order of dismissal. In the instant case, the tribunal has considered the merits of the matter against the respondent workman and come to the conclusion that looking to the evidence on record, misconduct is found to have proved and explanation given by the respondent workman is not accepted by the tribunal but the tribunal has taken into account the undisputed facts between the parties that during pendency of permission application, no subsistence allowance was paid to the respondent workman and that is how, the tribunal has set aside the order of dismissal and granted reinstatement with continuity of service with full backwages.

This aspect has been examined by the Apex Court in case of M.PAUL ANTHONY V. BHARAT GOLD MINES LTD reported in AIR 1999 SC 1416. The relevant observations made in para-31 to 33 are referred as under :-

"31. On joining Govt. Service, a person does not mortgage or barter away his basis rights as a human being, including his fundamental rights, in favour of the Govt. The Govt, only because it has the power to appoint does not become the master of the body and soul of the employee. The Govt. by providing job opportunities to its citizens only fulfils its obligations under the Constitution including the Directive Principles of the State Policy. The employee, on takin up an employment only agrees to subject himself to the regulatory measures concerning his service. His association with the Government or any other employer, like Instrumentalities of the Govt. or Statutory or Autonomous Corporation etc., is regulated by the terms of contract of service or Service Rules made by the Central or the State Govt. under the Proviso to Article 309 of the Constitution or other Statutory Rules including Certified Standing Orders. The Fundamental Rights, including the Right to Life under Article 21 of the Constitution or the basis human rights

are not surrendered by the employee. The provision for payment of subsistence allowance made in the service rules only ensures non violation of the right to life of the employee. That was the reason why this Court in State of Maharashtra v. Chanderbhan [1983] 3 SCR : [1983] 3 SCC 387 : AIR 1983 SC 803 struck down a Service Rule which provided for payment of nominal amount of Rupee one as Subsistence Allowance to an employee placed under suspension. This decision was followed in Fakirbhai Fulabhai Solanki v. Presiding Officer, [1986] 3 SCC 131 and it was held ion that case that if an employee could not attend the departmental proceedings on account of financial stringencies caused by non payment of subsistence allowance, and thereby could not undertake a journey away from his home to attend the departmental proceedings, the order of punishment, including the whole proceedings would stand vitiated. For this purpose, reliance was also placed on an earlier decision in Ghanshayam Dass Shrivastva Vs. State of Madhya Pradesh [1973] SCC 656 : AIR 1973 SC 1183.

32. The question whether the appellant was unable to go to Kolar Gold Fields to participate in the inquiry proceedings on account of non payment of subsistence allowance may not have been raised before the Inquiry Officer, but it was positively raised before the High Court and has also been raised before us. Since it is not disputed that the subsistence allowance was not paid to the appellant during the pendency of the departmental proceedings we have to take strong notice of it, particularly as it is not suggested by the respondent that the appellant had any other source of income.

33. Since in the instant case the appellant was not provided any Subsistence Allowance during the period of suspension and the adjournment prayed for by him on account of his illness, duly supported by medical certificates, was refused resulting in ex parte proceedings against him, we are of the opinion that the appellant has been punished in total violation of the principles of natural justice and he was literally not afforded any opportunity of hearing. Moreover, as pleaded by the appellant before the High Court as also before us that on account of his penury occasioned by non payment of subsistence

allowance, he could not undertake a journey to attend the disciplinary proceedings, the findings recorded by the Inquiry Officer at such proceedings, which were held ex parte, stand vitiated.

Recently also, this aspect has been examined by the Apex Court considering the earlier decision in respect of very subject in case of RAM LAKHAN ETC ETC V. PRESIDING OFFICER AND OTHERS reported in AIR 2000 SCW 1123. In the said decision, the Apex Court has also considered the earlier decision. The relevant observations made in para 19 to 21 are reproduced as under :-

"19. Read in the light of the above discussion, there will not be fond any conflict of opinion between the decisions rendered by tis Court in Hotel Imperial's case [AIR 1959SC 1342] [Supra] and in Fakirbhai's case [AIR 1986 SC 1186 : 1186 Lab.I.C. 879] Supra]. While right to place an employee under suspension pending disposal of the application under Section 33[1] is to be conceded to the Management on the basis of the decision in Hotel Imperial's case [Supra], the right of employee to receive subsistence Allowance during the period of such suspension has to be conceded to the employee on the basis of the decision in Fakirbhai's case [supra] and other decisions of this Court referred to above wherein the employee has been held to be entitled to Subsistence Allowance during the period of suspension.

20. We are conscious of the observations made by this Court in Hotel Imperial's case [AIR 1959 SC 1342] [supra] that the Management has no control over the disposal of application under Section 33[1] filed before the Industrial Tribunal and, therefore, if it has placed the employee under suspension, it will not be under any obligation to pay salary to the suspended employee for the period over which the application under Section 33[1] remains pending with the Tribunal. The Court further observed that if the application under Section 33[1] is allowed, the employee would be dismissed from service but if the application is rejected, the employee would be paid all the arrears of salary.

21. Just as the employer has no control over the disposal of the application under Section

> 33[1] of the Industrial Disputes Act, so also the employee has no control over the disposal of that application. Whether the employee would be retained in service or removed would be dependent upon the fate of the application. While the Management can afford to wait for he disposal of that application , it would be impossible for an employee who survives only on his salary to wait for the disposal of that application for an indefinite period. It would not be possible for him to sustain himself. It is in this light that the right to receive reduced salary [Subsistence Allowance] for the period of suspension has to be read along with the right of the Management to place the employee under suspension upending disposal of the application under Section 33[1] of the Industrial Disputes Act. Thus, the right of Management to suspend and the right of the employee to receive Subsistence Allowance are interewinded and both must survive together."

I have perused both the orders passed by the tribunal under challenge. Though the tribunal has specifically mentioned that merely misconduct is proved against the respondent workman and explanation given by the respondent workman is not accepted but tribunal has considered the legal effect of non payment of subsistence allowance during pendency of permission application and ultimately, considering the decisions of the Apex Cout in above referred two cases, the tribunal has rightly set aside the dismissal order, according to my opinion, the view taken by the tribunal in both these orders based upon decision of the Apex Court and thereafter, also in two recent decisions referred above the Apex Court has taken similar view. Therefore, according to my opinion, the tribunal has not committed any error while passing such award and there is no jurisdictional error no procedural irregularity committed by the tribunal which in no way calls for interference of this Court while exercising the powers under Article 226 and 227 of the Constitution and therefore, there is no substance in this petition. Therefore, this petition is rejected accordingly. Rule discharged. No order as to costs. Ad-interim relief, if any, stands vacated.

However, it is repeated that at the time of issuing RULE, this Court has passed the order to the effect that The prayer with regard to stay of the order regarding reinstatement in service cannot be granted. The workman shall be reinstated in service. ever, the workman shall be paid amount of back wages to the extent

of 50 % only. As regards the balance of amount of 50 % of the backwages is concerned, it is directed that the petitioner Corporation will be at liberty to withhold the same til the final disposal of the petition on condition that if the petitioner corporation fails in this petition, the amount retained by it, shall be paid to the respondent workman with 15 % interest. The amount of 50 % of the backwages of the workman shall be paid by the petitioner Corporation latest by March 31, 1991. Learned advocate Mr.Desai for petitioner submits that in light of above facts, the condition imposed by this Court to pay 15 % on 50 % backwages may be deleted considering the financial burden on the petitioner public body. Considering the request of petitioner, the condition imposed by the division bench of this Court vide order dated 21st January, 1991 requiring the petitioner to pay 15 % on failure in this petition, is hereby deleted. However, the petitioner Corporation is directed to pay rest of 50 % of the backwages of the interim period as per the award in question to the respondent workman within some reasonable time from the date of receipt of this order.

Date 3-5-2002 [H.K.RATHOD, J.]

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